



POLICE DEPARTMENT

March 28, 2019

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In the Matter of the Charges and Specifications : Case No.
- against - : 2017-17014
Police Officer David Mercado :
Tax Registry No. 952007 :
Emergency Service Squad 6 :
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At: Police Headquarters
One Police Plaza
New York, NY 10038

Before: Honorable Jeff S. Adler
Assistant Deputy Commissioner Trials

APPEARANCES:

For the CCRB-APU: Jeannie Elie, Esq.
Civilian Complaint Review Board
100 Church Street, 10th Floor
New York, NY 10007

For the Respondent: John Tynan, Esq.
Worth, Longworth & London, LLP
111 John Street – Suite 640
New York, NY 10038

To:

HONORABLE JAMES P. O'NEILL
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

CHARGES AND SPECIFICATIONS

1. Police Officer David Mercado, on or about August 27, 2016, at approximately 0025, while assigned to PBBNSU and on duty, in the vicinity of [REDACTED], wrongfully used force, in that he used a chokehold against Person A.
P.G. 221-01, Page 3, Paragraph 2(a) Chokehold
P.G. 221-01 Force Guidelines
P.G. 221-02 Use of Force
2. Police Officer David Mercado, on or about August 27, 2016, at approximately 0025, while assigned to PBBNSU and on duty, in the vicinity of [REDACTED], wrongfully used force against Person A, in that he pressed his forearm against Person A's neck, thereby causing his breathing to be restricted or hindered.
P.G. 221-02, Page 2, Paragraph 11 Use of Force
P.G. 221-01 Force Guidelines
P.G. 221-02 Use of Force
3. Police Officer David Mercado, on or about August 27, 2016, at approximately 0025, while assigned to PBBNSU and on duty, in the vicinity of [REDACTED], wrongfully used force, in that he struck Person A about the chest, without police necessity.
P.G. 221-02, Page 2, Paragraph 11 Use of Force
P.G. 221-01 Force Guidelines
P.G. 221-02 Use of Force
4. Police Officer David Mercado, on or about August 27, 2016, at approximately 0025, while assigned to PBBNSU and on duty, in the vicinity of [REDACTED], wrongfully used force, in that he struck Person A about the face, without police necessity.
P.G. 221-02, Page 2, Paragraph 11 Use of Force
P.G. 221-01 Force Guidelines
P.G. 221-02 Use of Force
5. Police Officer David Mercado, on or about August 27, 2016, at approximately 0025, while assigned to PBBNSU and on duty, in the vicinity of [REDACTED] abused his authority as a member of the New York City Police Department, in that he refused to provide his name and shield number to Person A without sufficient legal authority.
P.G. 203-09, Page 1, Paragraph 1 Courtesy
6. Police Officer David Mercado, on or about August 27, 2016, at approximately 0025, while assigned to PBBNSU and on duty, in the vicinity of [REDACTED] abused his authority as a member of the New York City Police Department, in that he stopped Person A without sufficient legal authority.
P.G. 212-11, Page 4, Paragraph 16 Abuse of Authority - Stop

7. Police Officer David Mercado, on or about August 27, 2016, at approximately 0025, while assigned to PBBNSU and on duty, in the vicinity of [REDACTED] [REDACTED] abused his authority as a member of the New York City Police Department, in that he frisked Person A without sufficient legal authority.

P.G. 212-11, Page 5, Paragraph 18 Abuse of Authority – Frisk

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on February 19 and 21, 2019. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. The CCRB called Person A, William Glasgow, Craig Gaddy, and Person B as witnesses. Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. Having reviewed all of the evidence in this matter, I find as follows:

Specifications 1 and 2 (chokehold, restricted breathing): Guilty

Specifications 3 and 4 (struck chest, face): Guilty

Specification 5 (refused to provide name/shield): Guilty

Specifications 6 and 7 (stop, frisk): Not Guilty

Recommended penalty: fifteen (15) vacation days.

ANALYSIS

This case began when Respondent was flagged down about an alleged kid with a gun on the corner [REDACTED] on August 27, 2016. Respondent and two other officers responded to the location at approximately 0031 hours, where they encountered 17-year old Person A. There are seven specifications against Respondent in connection with that encounter.

Person A testified that he was standing on the corner [REDACTED] waiting for his girlfriend to come meet him when a car pulled up alongside him. Person A had his phone in his right hand, which he promptly placed into his right pants pocket, so his hands were free and open. A man inside the vehicle yelled out, "hey," and three men emerged from the car and walked quickly toward him. Person A asked them what they were doing, but the men said nothing. Person A claimed that he did not initially realize they were police officers, but at some point during the encounter he did see a police badge. (Tr. 12-17, 22, 49, 56, 69)

According to Person A, one of the officers grabbed his left arm and tried to pull him, but Person A pulled free. Respondent then swung with his right fist, making contact with the area around Person A's right jaw and lower lip, and sliding down to his neck. Respondent followed up by placing his right forearm to Person A's throat, pushing the teenager's back into a street pole. Person A testified that Respondent held his forearm in that position for about 20-30 seconds, so that Person A had difficulty breathing and speaking. (Tr. 18-21, 24, 50, 54, 60-61, 66, 72, 76)

While he was being held against the pole, one of the officers searched Person A's left pants pockets, while another, possibly Respondent, searched his right side. The only items inside Person A's compression pants was the phone and a set of keys. Person A testified that he repeatedly asked for their names and badge numbers, but the officers did not provide them. Respondent stated only that they were looking for a gun, and the officers walked back toward their vehicle. Person A followed them to the car, and grabbed onto the driver's side window to prevent them from leaving. According to Person A, Respondent told him to get away from the vehicle and pushed him in his upper chest area beneath his throat. The officers then drove away from the location. (Tr. 22-23, 25, 28-29, 31, 51, 60-63, 70, 77-78)

After the officers departed, Person A called 911 to report being assaulted. His mother arrived, and about five-to-ten minutes later the same officers returned to the scene. Respondent spoke with Person A's mother, then walked over to Person A to apologize, though he didn't look Person A in the eye when doing so. Person A and his mother went to the [REDACTED] to report this incident. (Tr. 32, 45-48)

Person A testified that he suffered injuries to his wrist, neck, left side of his face, chest, collar bone, and back. Three photographs taken by a police officer at the stationhouse after the incident depict various injuries. CCRB Ex. 1 appears to show some redness on the right side of Person A's throat and neck area. CCRB Ex. 2 shows what appears to be a bruise to the neck and lower lip. CCRB Ex. 3 shows redness to his back. Person A claimed he went to see a doctor several days later. According to Person A, this was his first encounter with police officers. He did not file a lawsuit in connection with this incident. (Tr. 32-33, 38, 42, 47, 67-68)

William Glasgow testified that he was coming from work when he walked passed Person A, who was on his phone. Glasgow did not know the teen prior to this incident. A car pulled up, and Glasgow heard a commotion behind him. Three plain clothes officers exited the vehicle and stated to Person A, "Stop. Put your hands up." Glasgow turned, and from about six to seven feet away he watched as Respondent held Person A against a pole. Person A asked the officers, "What did I do?" At the same time, Respondent "put his forearm up and choked him right under his neck" for approximately four-to-five seconds. The other two officers searched the teen on both sides. (Tr. 87 92, 95, 97, 99 100, 102 07, 115-18)

The officers then turned and walked back toward their vehicle. According to Glasgow, Person A followed them and asked for their names and shield numbers "countless" times, but received no response from the officers. Person A briefly positioned himself between the officers and their car by the driver's door, and was gesturing with his hands as he continued to

ask the officers for their identification; Glasgow did not see Person A try to strike any of the officers. Respondent pushed Person A in his chest and told him to stay away. (Tr. 92-94, 108-11)

Craig Gaddy, a Clergy Council liaison [REDACTED] testified that he was on the way to a bodega when he saw the unmarked police car pull up in front of Person A, who was standing on the corner using his cell phone. From about 10-13 feet away, Gaddy watched as three officers exited their vehicle and grabbed the teen. Person A asked them who they were and what did they want. One of the officers told him to shut up, and Respondent hit Person A one time in the upper chest, below the throat. The officers continued "to handle" Person A, then walked back to their car. Person A tried to get their badge numbers, but the officers told him to shut up and did not provide the information. Near the rear driver's side door of the vehicle, Respondent punched Person A in the area around his left jaw or neck. The officers drove away from the scene, and Gaddy told Person A to call 911. The teen appeared to have swelling to his neck and the left side of his jaw. About five-to-seven minutes later, the officers returned, and spoke with Person A's mother. (Tr. 124-29, 132-35, 142-43, 146-51)

Person B, Person A's mother, testified that when she came downstairs she saw her son on the phone with 911. Person A was very upset, and red in the face. A car pulled up and the three officers exited. One of the officers spoke with her and explained they had been looking for a suspect with a gun on the corner [REDACTED]. When the officer stated that he wanted to apologize, Person B walked him over to her son; Person A yelled at the officer, and so there was no apology. Person B asked the officers for their names and shield numbers, and that information was provided. (Tr. 159-60, 163, 166)

Respondent, who presently is with the Emergency Service Unit, was assigned to [REDACTED]

[REDACTED] to do [REDACTED] Anti-Crime duties on the date of the incident.

Specifically, Respondent was assigned that night to an area where there had been a spike in violent felonies, including shootings. Respondent had previously been involved in about two hundred gun arrests. Respondent testified that on the corner [REDACTED] he and two other members of his crime team were flagged down by an "older gentleman" who told the officers that there was a kid on the next corner who had a gun. The male pointed north to the intersection [REDACTED]. The male, who was previously unknown to Respondent, did not appear intoxicated or otherwise questionable as a source, but Respondent conceded that they did not get his name or any further details about the kid with the gun. Respondent also acknowledged that he wrote in his memo book that the tip was for a "male" with a gun, rather than using the word "kid." (Tr. 178 79, 183-84, 188, 203-05)

The officers drove straight to the intersection [REDACTED] where they observed Person A, the only person present at the intersection. The car pulled alongside Person A, and from the rear seat Respondent identified himself as a police officer and tried to engage the teen in a conversation, asking him what he was doing; Person A did not answer. According to Respondent, Person A placed his right hand, in which he was holding an unidentified object, into his right pants pocket, and "proceeded to blade his body," turning so that his right side was further away from the officers. Respondent explained that this is a furtive movement normally taken by an individual who is intending to fight, swing, or shoot a firearm. (Tr. 185-87, 210-12, 225-26)

Respondent exited the vehicle and repeatedly ordered Person A to show his hands, but Person A did not respond, and kept his hand in his right pocket. Respondent considered this "a safety issue," believing that Person A was trying to hide something. Respondent grabbed Person A's right wrist with his left hand, and Person A tried to pull away. With his other hand, Respondent, by himself, did a thorough frisk, including both of the teen's pockets, and

determined that the object was a cell phone; no weapons or contraband were recovered. According to Respondent, a "combative" Person A backed into the pole as Respondent held his wrist; Respondent did not push him against the pole. Respondent also denied using his forearm to push or restrain Person A, and never placed his hand near or around the teen's neck. An irate Person A was yelling loudly, asking why they were doing this to him; Respondent could not get a word in to explain why they were checking his pockets. Respondent did not hear the teen ask for his name and shield number. Respondent testified that as the officers returned to their car, Person A pulled on the right arm and shoulder of one of the other officers, preventing him from getting in the driver's seat of the vehicle. Respondent then pushed Person A in his arm and chest area, and the officers drove away to continue canvassing. (Tr. 189-93, 198-201, 213-16, 218-19)

The officers circled around back to the same intersection a couple minutes later, and Respondent saw Person A, who still was visibly irate, talking with his mother. Respondent testified that he explained to Person B what had happened, and she told him to talk to her son instead. Respondent tried to speak with a screaming Person A, but again he couldn't get a word in. Respondent turned back to Person B, and wrote down the names and shield numbers of the three officers, and the officers resumed patrol. (Tr. 195-97, 222)

The specifications will be considered out of numerical order, based on the chronology of events.

Specifications 6 and 7 charge Respondent with abusing his authority as a member of the Department by stopping and frisking Person A without sufficient legal authority. Section 212-11 of the Patrol Guide states that a level 3 stop may be conducted only when an officer has a reasonable suspicion that the person stopped has committed, is committing, or is about to commit a felony or Penal Law misdemeanor. "Reasonable suspicion" exists when the information

known to the officer would make an ordinarily prudent and cautious officer under the circumstances believe that criminal activity is at hand. A frisk is authorized if the officer reasonably suspects the person is armed and dangerous.

Here, I credit Respondent's straight-forward testimony that he received a tip from an individual that there was a kid on the next corner with a gun. Counsel for the CCRB correctly noted, however, the lack of any additional description or details from the informant. As such, at the point the officers approached Person A, Respondent at most had a common-law right to inquire, but no justification for taking more intrusive police action.

However, once Respondent arrived at the corner [REDACTED], the situation escalated. After Person A refused to answer Respondent's questions, Respondent observed him place an object inside his right pants pocket; Person A, himself, acknowledged that he placed his right hand in his pocket. I credit Respondent's testimony that he saw Person A, with his right hand still in his pocket, turn so that his right side was further away from Respondent. Respondent reasonably was concerned for his safety at this point: it is important to keep in mind that the officers were directed to this specific intersection by a tip regarding possession of a gun, and that this sequence of events was unfolding late at night, in a location that was specifically being focused on by anti-crime units because of recent violent felony crimes, including shootings. Even though Respondent could not identify the object, and did not specifically see a weapon, under the totality of these circumstances he did have a reasonable basis for believing he was in danger, and for taking more intrusive police action. Indeed, based on Respondent's experience, the information he had, and the observations he made, it would have been dangerously unrealistic to expect an officer in that situation to assume the risk that Person A's conduct was innocuous or innocent. See, e.g. *People v. Benjamin*, 51 NY2d 267 (1980) (stop

and frisk justified based on anonymous tip coupled with suspect's act of stepping back and reaching to the rear of his waistband).

As such, Respondent acted with reasonable suspicion when he stopped Person A, and frisked him for a weapon. Under these specific circumstances, the record has failed to establish, by a preponderance of the credible evidence, that Respondent abused his authority as a member of the service by stopping and frisking Person A, and I find him not guilty of Specifications 6 and 7.

Specifications 1, 2, and 4 charge Respondent with wrongful use of force against Person A. Specifically, Specification 4 alleges that when he first approached Person A, Respondent struck him in the face without police necessity. Specifications 1 and 2 charge Respondent with using a chokehold against Person A, and with causing Person A's breathing to be restricted or hindered.

Section 221-01 of the Patrol Guide states that excessive force by a member of the service will not be tolerated. The section specifically prohibits the use of a chokehold, which it defines as follows: "a chokehold shall include, but is not limited to, any pressure to the throat or windpipe, which may prevent or hinder breathing or reduce intake of air." This definition of what constitutes a chokehold focuses on the conduct itself, rather than the intention of the officer. If an officer exerts pressure on a person's throat or windpipe in the manner proscribed, that officer will run afoul of the guidelines, and be subject to discipline.

Here, the credible evidence has established that Respondent did wrongfully strike Person A in the face, and did use a chokehold, which hindered Person A's breathing. Person A, who did not file a lawsuit in connection with this incident, testified in a consistent, logical manner about how Respondent initially came toward him and swung with his right fist, striking Person A in the lower right chin area, and making contact with his right throat area as

well. Respondent then placed his forearm into the teen's throat as he pinned him against a pole. As a result of that pressure, Person A had difficulty breathing. Person A testified that he suffered multiple injuries from this conduct; bruising to his lip, throat and neck area, and back are confirmed from the three photographs in evidence.

Further, Person A's description of events received additional corroboration from the independent eyewitnesses who observed what occurred. Glasgow, in particular, provided testimony that was detailed and essentially consistent with Person A's account. He was straight-forward and convincing as he described how Respondent pinned Person A against a pole and placed his forearm on Person A's neck, choking him for several seconds. Gaddy testified that he observed Respondent hit Person A in the upper chest area, below the throat.

Respondent's denial, meanwhile, was not persuasive. He claimed that he never struck Person A in the face or placed his forearm to the teen's throat, insisting instead that he merely held Person A's wrist while he conducted a full body frisk. That claim, however, was not corroborated by any of the several witnesses present at the scene. Respondent's self-serving attempt to minimize his actions was not credible, particularly when compared to the detailed accounts provided by Person A and Glasgow.

As such, the credible evidence has proven that Respondent wrongfully struck Person A in the face without police necessity. Even though Respondent was justified in stopping and frisking Person A, the gratuitous punch in the face, under these particular circumstances, was unreasonable and excessive. The record also has established that Respondent used a chokehold against Person A: Respondent wrongfully pressed his forearm against the teen's neck for several seconds, thereby hindering or restricting his breathing. Accordingly, I find Respondent guilty of Specifications 1, 2, and 4.

Specification 5 charges Respondent with refusing to provide his name and shield number to Person A. Section 203-09 (1) of the Patrol Guide requires an officer to courteously and clearly state his rank, name, shield number, and command, or otherwise provide them, to anyone who makes such a request. Here, Respondent testified that he never heard Person A ask for his name or shield number, but that claim was consistently contradicted by the testimony of the other witnesses. Person A testified that he repeatedly asked the officers for their names and badge numbers, but received no response. Glasgow confirmed that Person A asked for the officers' name and shield numbers multiple times, but they did not provide the information. Gaddy, too, testified that he heard Person A try to get their badge numbers, to no avail. The credible evidence has established that Person A did request this information from Respondent, and that Respondent left the scene without providing it.

This tribunal is mindful that Respondent did write down the relevant information for Person A's mother when the officers returned to the scene a few minutes later, as Person A continued to yell at them. However, that does not excuse Respondent's failure to provide his name and shield number when Person A requested them during the initial encounter. Accordingly, I find Respondent guilty of Specification 5.

Specification 3 charges Respondent with striking Person A about the chest without police necessity. Specifically, it is alleged that when Person A was standing by the police car trying to get the names and shield numbers of the officers, Respondent pushed him one time in the upper chest area, beneath his throat. Person A acknowledged that he was trying to prevent the officers from leaving, and testified that Respondent pushed him backward. Glasgow testified that he saw Respondent push Person A in the chest. Gaddy also testified that he observed Respondent strike Person A in the area around his jaw or neck as they stood by the police car. Respondent, himself, admitted to pushing Person A away, claiming that he did so only after

Person A grabbed the arm and shoulder of one of the other officers. In light of the corroboration from the other witnesses, I credit Person A's testimony that he was struck in the upper chest by Respondent. Further, I reject Respondent's testimony that Person A initially grabbed the shoulder of one of the other officers, as that claim was not corroborated by any of the witnesses present at the scene.

This tribunal is mindful that Person A was interfering with the officers' attempt to leave the location. However, at the point where Respondent struck Person A, there was no indication that Person A posed a threat to the safety of the officers. Person A had already been frisked, and the officers were preparing to leave the location. Person A only followed the officers to the car because of their refusal to provide their identification information. Under these circumstances, Respondent's act of striking Person A was without police necessity, and I find him guilty of Specification 3.

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 240 (1974). Respondent was appointed to the Department on January 9, 2012. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum. In 2018, Respondent forfeited seven (7) vacation days for charges involving a wrongful stop and frisk.

Respondent has been found guilty of wrongfully using a chokehold against Person A, hindering his breathing in the process. Recent case precedent supports the forfeiture of ten (10) vacation days for such conduct. See e.g., *Disciplinary Case Nos. 2016-15000* (Jul. 6, 2018); *2016-14996* (Apr. 17, 2018); *2015-14914* (Oct. 25, 2017). Respondent also has been found

guilty of twice striking Person A without police necessity, and refusing to provide his name and shield number. For that conduct, additional penalty days are warranted.

This Tribunal is mindful that Respondent is a highly rated member of the Department, who has received 16 medals in recognition of his performance. Also, Respondent has been found not guilty of two of the charges, alleging a wrongful stop and frisk. Nevertheless, Respondent needed to be more measured in how he conducted this stop, and there must be appropriate accountability for his actions in this case. The recommendation of fifteen (15) vacation days made by the CCRB is reasonable. Taking into account the totality of circumstances and issues in this matter, I recommend that Respondent forfeit fifteen (15) vacation days.

Respectfully submitted,



Jeff S. Adler
Assistant Deputy Commissioner Trials

APPROVED



MAY 17 2010
JAMES P. O'NEILL
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER DAVID MERCADO
TAX REGISTRY NO. 952007
DISCIPLINARY CASE NO. 2017-17014

Respondent was appointed to the Department on January 9, 2012. On his last three annual performance evaluations, he received 4.5 ratings of "Extremely Competent/Highly Competent" for 2015 and 2016, and a 5.0 rating of "Extremely Competent" for 2017. [REDACTED]

[REDACTED] He has received nine medals for Excellent Police Duty and seven medals for Meritorious Police Duty.

In 2018, Respondent forfeited seven (7) vacation days for (i) frisking a civilian without sufficient legal authority, (ii) searching a civilian without sufficient legal authority, (iii) stopping a civilian without sufficient legal authority, (iv) stopping a second civilian without sufficient legal authority, and (v) stopping a third civilian without sufficient legal authority.

For your consideration.

Jeff S. Adler
Assistant Deputy Commissioner Trials